

Domestic Relations - Public Policy Requires Enforcement of Invalid Separation Agreement to Prevent Unjust Enrichment

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in not heeding the effect of wind and tide on the *Christopher Gale*.³⁶ Petitioner asserted that the pilot, their own employee, was the servant of the respondents and that they, by virtue of the pilotage contract, were not responsible for his negligence, and further, that they were entitled to affirmative relief in that the pilot was acting as the servant of the respondent. The district court denied recovery. The circuit court affirmed.³⁷ The Supreme Court held that the petitioner would not be responsible for the negligence of the pilot (giving effect to a pilotage release from liability for negligence clause) in any damage to respondent's ship, but that the tow company could not obtain affirmative relief for damage to their own ship caused by their pilot's negligence. The Supreme Court, however, hints that perhaps, with proper contractual language, such liability might attach.

The decision in the instant case sets the law at rest, stating definitely that a tug, whether acting as a common or contract carrier, cannot by contract escape liability for its negligence. The *Bisso* case combined with the *Boston Metals* case indicates that the Court will not allow this rule to be circumvented. The exception in favor of pilotage contracts is recognized in the *Bisso*, the *Boston Metals* and the *Nielson* cases, the last named case denying affirmative relief on the basis of such a contract. Thus, there would seem to be little room for question left in this area. There will be little chance for a change unless, perhaps, it could be shown authoritatively that such rules work a hardship on tug companies, that they are less able to carry the risk of loss than the shippers, that, in short, the rules are outmoded.

³⁶ The Dauntless No. 6, 112 F. Supp. 730 (E.D. N.Y., 1953).

³⁷ United States v. Nielson, 209 F. 2d 958 (C.A. 2d. 1954).

DOMESTIC RELATIONS—PUBLIC POLICY REQUIRES ENFORCEMENT OF INVALID SEPARATION AGREEMENT TO PREVENT UNJUST ENRICHMENT

Plaintiff, nearly twenty years before bringing suit, entered into a separation agreement with his wife at a time when they were living separately. Plaintiff and wife were Illinois residents. By the agreement the wife in consideration of \$2,000 paid waived her rights in any property which plaintiff then owned or should later acquire. Plaintiff, by the agreement, waived his rights to property which his wife owned or should later acquire. By another clause, the wife waived her rights to support by plaintiff. A series of Illinois decisions¹ has held separation agreements invalid

¹ Lagow v. Snapp, 400 Ill. 414, 81 N.E. 2d 144 (1948); Berge v. Berge, 366 Ill. 228.

where they have included waiver of support clauses, and plaintiff claimed that the support waiver invalidated the entire agreement and that he was therefore entitled to claim an intestate interest in the estate of his wife, now deceased. A decree in favor of plaintiff was entered by the trial court. On appeal by executrix, the Illinois Supreme Court held that the invalid support waiver did not entitle plaintiff to repudiate his surrender of rights in his wife's estate after her death. *Laleman v. Crombez*, 6 Ill. 2d 194, 127 N.E. 2d 489 (1955).

Separation agreements have received changing treatment by the courts over the years. At one time all separation agreements were held void as against public policy.² The courts held that the marriage contract was a lifetime agreement that could not be released through the private acts of husband and wife. As divorce became more widely recognized, contracts in the form of separation agreements became acceptable to the courts if entered into either after or immediately before separation.³ Recognition has reached the extent of enforcing specific performance of the agreement to live apart.⁴ However, agreements in contemplation of a future separation continue to be held void.⁵

Two lines of thought have developed regarding the validity of the inclusion of support waivers in separation agreements otherwise valid. One view holds that a separation agreement is valid, whether or not an express support waiver is included, provided fraud and duress are absent. This view takes the position that individuals have the right to contract as they wish, and that the courts will not intervene as to the terms of a contract, unless there is fraud or duress.⁶

The second view accepts a waiver of claim to a spouse's estate, but holds separation agreements invalid where there is a waiver of a husband's duty of support. New York and Illinois have experienced frequent litigation on separation agreements and support this view, New York by decision and statute, and Illinois by decision. Both states hold lump sum settlements invalid as consideration for a support waiver. New York, however,

8 N.E. 2d 623 (1937); *Vock v. Vock*, 365 Ill. 432, 6 N.E. 2d 843 (1937); *Van Koten v. Van Koten*, 323 Ill. 323, 154 N.E. 146 (1926); *Lyons v. Schanbacher*, 316 Ill. 569, 147 N.E. 440 (1925).

² Madden, *Handbook of the Law of Persons and Domestic Relations* § 100 (1931).

³ *Sumner v. Sumner*, 121 Ga. 1, 48 S.E. 727 (1904); *Hoskins v. Hoskins*, 201 Ky. 208, 256 S.W. 1 (1923).

⁴ Madden, *op. cit.* supra note 2.

⁵ *Terkelsen v. Peterson*, 216 Mass. 531, 104 N.E. 351 (1914); *Winter v. Winter*, 191 N.Y. 462, 84 N.E. 382 (1908).

⁶ *Gore v. Plair*, 173 Ga. 88, 159 S.E. 698 (1931). See also the Maryland Statute which states: "Any deed or agreement between husband and wife respecting support, maintenance, property rights, or personal rights . . . shall be valid, binding, and enforceable to every intent and purpose . . ." although there is provision for modification as regards the support of children. Md. Ann. Code (1939) Art. 16, § 42.

has stated that a wife cannot validly contract to relieve her husband of his duty of support, but that a husband and wife may agree upon an amount of support which the courts will not disturb unless it is found to be grossly unjust and insufficient.⁷ New York courts consider the fairness of each support-providing contract as a whole and have held some valid⁸ and others void⁹ depending on the adequacy of the payments and the financial circumstances of the husband and wife. An inadequate allowance is considered as a breach of the support duty.

In Illinois, the inclusion of an express waiver of support, if it has been inseparably interwoven into the contract, has consistently resulted in the invalidation of the total agreement,¹⁰ and the duty to support the wife remains unchanged by this type of separation agreement.

"Marriage is a civil contract to which there are three parties—the husband, the wife, and the state . . . controlled by law for the benefit of society at large."¹¹ "One of the contractual obligations of the marriage contract is the duty of the husband to support the wife, and this contractual obligation cannot be abrogated without the consent of the third party—the State."¹² Wives, separated from their husbands under a separation agreement, have, in Illinois, sought and obtained court invalidation of the agreement and a further court order on the husband for separate maintenance.

In the instant case plaintiff-husband seeks to show the agreement invalid because of the support waiver, and therefore be able to claim against his wife's estate. This is its distinguishing feature.

The court, in estopping plaintiff from claiming, expressly overruled in part certain of its most important precedent cases. *Lyons v. Schanbacher*¹³ had declared that an entire contract is void if any part of the consideration is illegal, and,

When valid provisions of a contract are blended with invalid provisions, the whole contract will be void. "That which is bad destroys that which is good, and both perish together."¹⁴

The court, in that case, decreed that a support agreement which contained a support waiver was invalid and the husband could receive a decree of partition of the real estate of his deceased wife. *Lagow v. Snapp*¹⁵ also de-

⁷ New York Domestic Relations Law (McKinney, 1941) § 51.

⁸ *Schmelzel v. Schmelzel*, 287 N.Y. 21, 38 N.E. 2d 114 (1941).

⁹ *Dolan v. Dolan*, 296 N.Y. 860, 72 N.E. 2d 603 (1947); *Kyff v. Kyff*, 286 N.Y. 71, 35 N.E. 2d 655 (1941).

¹⁰ Cases cited *supra* note 1.

¹¹ *Leland v. Leland*, 319 Ill. 426, 430, 150 N.E. 270, 271 (1925).

¹² *Van Koten v. Van Koten*, 323 Ill. 323, 154 N.E. 146 (1926).

¹³ 316 Ill. 569, 147 N.E. 440 (1925).

¹⁴ *Ibid.*, at 574 and 442.

¹⁵ 400 Ill. 414, 81 N.E. 2d 144 (1948).

clared that an invalid provision which is a material part of the entire consideration voids the entire contract.

However the court in the instant case endorsed the public policy that refuses to aid a party who has benefited from an agreement and now seeks to have it held void. In this case non-enforcement of the illegal contract would be injurious to the deceased wife's estate, and enforcement would benefit plaintiff who has already enjoyed the maximum benefits of his wife's release. Since enforcement of the contract would contravene public policy, the court held the parties to the terms of the agreement.

In holding support waivers invalid because of public policy, courts seek to protect the wife as well as the public which might have to support the wife if waiver of the support duty was tolerated. The court cited *Central Republic Trust Co. v. Evans*,¹⁶ which stated:

Public policy frequently requires the enforcement of a contract tinged with illegality where not to do so would produce a harmful result on the persons for whose protection the law violated exists.¹⁷

This rationale for the enforcement of an invalid contract has frequently been applied to cases involving business contracts, but rarely if ever to separation agreements.

By overruling the *Lyons* case, the court has met an important criticism, viz., that its earlier decision had overstressed the invalidation of an entire separation agreement because of the presence of an express support waiver and, as a consequence, had unjustly enriched the husband-claimant. Consistency has now been achieved through protecting the wife and the public while simultaneously preventing the husband's unjust enrichment.

¹⁶ 378 Ill. 58, 37 N.E. 2d 745 (1941).

¹⁷ *Ibid.*, at 71 and 751.

EVIDENCE—REFUSAL TO PERMIT CROSS-EXAMINATION OF WITNESS AS TO DRUG ADDICTION FOR IMPEACHMENT PURPOSES HELD REVERSIBLE ERROR

Defendant was convicted of murder largely upon the testimony of an accomplice witness, and the jury recommended the maximum penalty. The trial court sustained objection to the following questions by the defense on cross examination of the accomplice witness:

1. "Are you a narcotic addict?"
2. "Do you take the stuff?"
3. "Did you ever take heroin?"
4. "Didn't you, on March 20th, buy some narcotics and pay \$17.00 for it?"